Nos. 89-1027 & 89-1028

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

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CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

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**On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS

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## BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS

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This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. The National Railway Labor Conference ("NRLC") urges the Court to grant the petitions for writs of certiorari in these two cases, which seek review of the same decision of the District of Columbia Circuit.

## STATEMENT OF THE CASE

Under § 11343 of the Interstate Commerce Act ("ICA"), railroad mergers and consolidations and other similar transactions "may be carried out only with the approval and authorization of the" Interstate Commerce Commission ("ICC").[1] Under ICA § 11344, when considering a proposed merger or consolidation, the ICC must balance a number of factors, including "the interest of carrier employees affected by the proposed transaction," and "shall approve and authorize" the transaction "when it finds the transaction is consistent with the public interest." The ICC is then required under ICA § 11347 to impose labor protective conditions to compensate employees for adverse effects resulting from the transaction.

Section 11341(a) of the ICA provides that the ICC's authority under §§ 11343-11347 is "exclusive," and that "a carrier, corporation, or person participating in" a transaction approved under those provisions "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *."[2]

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[1] The ICA was codified in 1978 as Subtitle IV of 49 U.S.C. Public Law 95-573, 92 Stat. 1337. Citation herein to a current section of the Act is to that section of 49 U.S.C.

[2] Current § 11341(a) derives from former § 5(11) of the ICA, which was enacted in 1940 to provide that the Commission's authority over mergers and consolidations "shall be exclusive and plenary," and that carriers participating in such approved transactions "shall be and they hereby are relieved from the operation of the antitrust laws and of *all other restraints, limitations, and prohibitions of law, Federal, State, or municipal,* insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission * * *." Transportation Act of 1940, ch. 722, § 7(11), 54 Stat. 899, 905 (1940) (emphasis added). Similar provisions have appeared in the ICA since 1920. See Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482 (1920). Section 5(11) was recodified "without substantive change" as § 11341(a) in 1978. Public Law 95-473 § 3(a), 92 Stat. 1466.



The question presented by the petitions in these cases is whether the exemption from "all other law" in § 11341(a) applies to provisions of collective bargaining agreements, otherwise enforceable under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, that if enforced would prevent a carrier from "carrying out" an approved merger or consolidation.

In each of the two instant cases, the petitioners, pursuant to merger authority granted by the ICC, proposed to consolidate certain operating functions on the merged railroad systems, which would require the transfer of some work and employees. Affected employees would, however, be entitled to make-whole compensatory benefits under the ICC's standard *New York Dock* Labor protective conditions required under ICA § 11347 for all transactions undertaken pursuant to merger authority under ICA § 11343.[3]

Under the *New York Dock* conditions, an "implementing agreement" providing the terms for any rearrangement of work-forces must be in place before a transaction can be consummated; binding arbitration is required on any such implementing issues that remain unresolved through negotiations after 90 days' notice of the proposed transaction is given to unions representing affected employees.[4] In these cases, the respondent unions argued in the implementing arbitration proceedings that their collective bargaining agreements would not permit (and in No. 89-1028, actually prohibited) the transfers of work and employees on the terms proposed by the car-

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[3] See *New York Dock Ry.—Control—Brooklyn E.D. Terminal,* 360 I.C.C. 60, 84-90 (1979), *aff'd sub nom. New York Dock Ry.* v. *United States,* 609 F.2d 83 (2d Cir. 1979).

[4] *New York Dock, supra,* 360 I.C.C. at 85.

riers, and that the consolidations must therefore be delayed until the carriers exhausted the RLA "major dispute" procedures for negotiating changes to collective bargaining agreements. Those procedures, as this Court has noted, are notoriously "long and drawn out" and "almost interminable."[5] If these RLA procedures are exhausted without yielding agreement, arbitration is available, but cannot be compelled,[6] and when unions refuse arbitration they are free to resort to strikes and nationwide secondary picketing to block changes proposed by carriers.[7]

The arbitrator in each of these cases rejected the unions' arguments that their collective bargaining rights under the RLA could be enforced to prohibit the proposed transactions. The unions appealed the arbitration awards to the ICC, which also held in each case that § 11341(a) relieved the carriers of the obligations the unions had asserted under the RLA and their collective bargaining agreements since these obligations would otherwise defeat the proposed transactions. (No. 89-1027 App. 33a-35a, 37a; No. 89-1028 App. 44a).

The unions sought review of the ICC's decisions in the District of Columbia Circuit, which "dispose[d] of the two cases together because they raise[d] common issues with respect to the ICC's authority [under ICA § 11341(a)] to exempt a party to a merger between two railway carriers" from "the provisions of (1) a Collective Bargaining Agreement (CBA); and (2) the Railway Labor Act * * *." (No. 89-1027 App. 2a). The court of appeals held that the exemption under § 11341(a)

[5] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246, 244 (1966); *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969).

[6] See *Elgin J. & E. R. Co.* v. *Burley*, 325 F.2d 711, 725 (1945).

[7] See *Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429, 450-53 (1987).



from "all other law * * * as necessary * * * to carry out" an approved merger or consolidation, does not apply to RLA collective bargaining agreements, because, in the court's view, the exemption should confer immunity only from "positive enactments, not common law rules of liability, as on a contract." (*Id.* at 18a). In light of that holding, the court of appeals deemed it unnecessary to decide whether the § 11341(a) exemption applies to the RLA itself, and remanded that issue, among others, to the ICC. (*Id.* at 25a).

The ICC, in a document styled "Petition for Rehearing," advised the court of appeals that it would conduct proceedings on the remanded issues, and asked the court to hold the "Petition" pending the outcome of those proceedings. The court of appeals has deferred consideration of the ICC's petition until the decision on remand is issued, and the original panel has amended its judgment to retain jurisdiction of the cases. (No. 89-1027 Pet. App. 54a, 27a-28a).

## INTEREST OF *AMICUS CURIAE*

The NRLC is an unincorporated association which includes most of the nation's major railroads among its members. The NRLC represents its members in multi-employer collective bargaining under the RLA and with respect to other labor relations issues of general concern to the railroad industry that may arise before federal and state courts, legislatures, and administrative agencies.

The question presented in these cases is of paramount importance to the railroad industry. The ability of carriers to rationalize their operations through mergers and consolidations is critical to the maintenance of a viable national railroad transportation system. The decision below creates substantial doubt as to whether carriers will have that ability any longer, for the holding that § 11341(a) does not exempt carriers from obligations under collective bargaining agreements paves the way for

rail labor to interpose its asserted private interests under agreements as impediments or even absolute bars to the implementation of mergers and consolidations authorized by the ICC under the ICA's public interest standard. That doubt will exist even where no express merger-barring provision is included in a collective bargaining agreement (as in the case in No. 89-1027), because the unions have asserted in the proceedings before the ICC in this matter that transfer of work and employees in mergers and consolidations is effectively barred by seniority rules and other general rules that, in the NRLC's experience, are included in virtually *every* work-rule agreement in the railroad industry. Unless the decision below is reversed promptly, many carriers will be deterred from undertaking mergers and consolidations, or from further implementing those already approved by the Commission and underway. Accordingly, the NRLC and its member railroads have a vital interest in prompt resolution by this Court of the uncertainty created by the decision below as to the railroads' right to implement mergers and consolidations on the terms approved by the ICC.

## SUMMARY OF ARGUMENT

The petitions for certiorari demonstrate that the decision of the District of Columbia Circuit is in conflict with decisions of this Court and of other circuits and is flatly contrary to the plain language of § 11341(a) and its legislative history. The NRLC will not repeat that showing here, but will address itself to the reason why this Court should grant review of the question presented in these cases *now*, notwithstanding the pendency of further proceedings on other questions before the ICC and the court of appeals. Simply put, the question presented by the decision below is of such imperative public importance that immediate review by this Court is war-



ranted.[8] Congress has determined and repeatedly stated that railroad consolidations and mergers are generally in the public interest. Congress has vested the ICC with exclusive jurisdiction to determine whether individual mergers and consolidations comport with the public interest standard and to establish the conditions upon which such transactions may go forward. Under the decision below, the private interests of rail labor under RLA collective bargaining agreements may trump both the general public interest determination of the Congress and the individual public interest determinations of the ICC by blocking approved mergers and consolidations. The resulting uncertainty as to the ability of carriers to implement mergers and consolidations approved by the ICC threatens to call an immediate halt to such transactions, contrary to the public interest and the express intent of Congress. Immediate review by this Court is necessary to remove that injurious uncertainty.

## ARGUMENT

### The Decision Below Threatens to Bring an Immediate Halt to The Implementation of Railroad Mergers and Consolidations that Congress Has Determined Are in the Public Interest and Should be Encouraged, and Therefore Immediate Review by this Court is Warranted.

The cardinal purpose of the ICA, as this Court has observed, is "the maintenance of an adequate rail transportation system." *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). That purpose is today expressed in ICA § 10101a, which establishes the "policy of the United States" with respect to the railroad industry. See § 10101a(3), (4), (5). And for over 60 years, Congress has sought to effectuate that purpose by encouraging rail-

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[8] Indeed, this Court granted certiorari on a similar question, in very similar circumstances, in *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987). In that case the District of Columbia Circuit had vacated ICC orders which relied on § 11341(a) to reject a union's

road mergers and consolidations. As this Court explained in *Lowden*, *supra*, "[a]s a result of the Transportation Act in 1920," the progenitor of the modern ICA, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy • • • so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." 308 U.S. at 232.

Congress has repeatedly reaffirmed that "established national policy." The Transportation Act of 1920, which left mergers and consolidations largely to the Commission's initiative (see 308 U.S. at 232), proved insufficient to its end. In the Transportation Act of 1940, therefore, Congress amended the ICA to add the predecessor of current § 11343, giving rail carriers principal authority to initiate mergers and consolidations. § 7(2), 54 Stat. 905. The chief goal of this amendment "'was to facilitate merger and consolidation in the national transportation system.'"[9]

Congress last revisited this issue in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. 94-210, 90 Stat. 31, which continued the

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claim that its collective bargaining agreement and the RLA barred implementation of a § 11343 transaction as approved by the Commission; the court held that the ICC was required to make explicit findings as to the necessity for the § 11341(a) exemption and remanded the case back to the ICC for further proceedings. *Brotherhood of Loc. Engineers* v. *ICC*, 761 F.2d 714, 716 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987). This Court granted certiorari "on the question of the proper construction of § 11341(a)" despite the remand order (although the Court ultimately concluded on other procedural grounds that the question was not properly presented in that case). 482 U.S. at 277, 284, 286-87. *Cf.* Supreme Court Rule 11, authorizing writs of certiorari before judgment.

[9] *Maintenance Employes* v. *United States*, 366 U.S. 169, 173 (1961), *quoting County of Marin* v. *United States*, 356 U.S. 412, 416 (1958).



national pro-merger policy. The 4-R Act "was an attempt to restructure the railroad industry in the face of chronic financial losses and line closures."[10] It sought to promote an efficient rail transportation system through (among other things) "the encouragement of efforts to restructure the system on a more economically justified basis" by providing "an expedited procedure for determining whether merger and consolidation applications are in the public interest • • •." 4-R Act § 101(a)(2), 90 Stat. 33, codified at 45 U.S.C § 801(a)(2). Once again, Congress avowedly "intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system • • •."[11]

The decision below strikes an immediate and potentially crippling blow to this important national policy. If RLA collective bargaining agreements can be enforced to prohibit the implementation of approved mergers and consolidations, notwithstanding the express exemption in ICA § 11341(a) from all obligations under "other law" that might otherwise have such merger-barring effect, and if, as the unions contend, those agreements cannot be altered except through the RLA major dispute provisions, then rail labor will have "carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC" or to "block consolidations which are in the public interest," as the United States Court of Appeals for the Eighth Circuit has recognized.[12] The federal courts have long agreed that subjecting the implementation of an approved merger or consolidation to the RLA major dispute procedures, with

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[10] *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 965 (9th Cir. 1986).

[11] S. Rep. No. 94-499, 94th Cong. 1st Sess. 20-21 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34.

[12] *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 112 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).

their attendant delays and ultimate threat of strikes, would "threaten to prevent many consolidations" and mergers, because "under the Railway Labor Act [major dispute] provisions it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate." [13]

Until the decision below, the courts have likewise agreed that it is "inconceivable" that Congress could have intended to grant rail labor such a "veto" power over transactions Congress and the ICC have determined are in the public interest.[14] The decision below nonchalantly accepts the possibility that such a labor veto exists, opining, for example, that the carriers in No. 89-1027 might as well decide to cancel the disputed consolidation in that case, regardless of the outcome of the issues remanded to the ICC, in view of the court's holding that ICA § 11341(a) could not be applied to "set aside" any agreement that "would have prevented the consolidation from going forward * * *." (No. 89-1027 App. 25a).

While the possibility of such a labor veto over mergers and consolidations exists, few, if any, of these transactions are likely to go forward. That can be seen from the history of the litigation over the application of RLA major dispute procedures to line sales to new regional railroads under ICA § 10901, which culminated in this

[13] *Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); accord *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971).

[14] *Missouri Pacific*, *supra*, 782 F.2d at 112; see also, *e.g.*, *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Nemitz*, *supra*, 436 F.2d at 845; *Chicago & N.W. Ry.*, *supra*, 314 F.2d at 432; *Railway Labor Exec. Ass'n* v. *Guilford Transp. Indus., Inc.*, 667 F. Supp. 29, 34-35 (D. Me. 1987), *aff'd*, 843 F.2d 1383 (1st Cir.) (Table), *cert. denied*, 109 S. Ct. 3213 (1989). See also *ICC* v. *Locomotive Engineers*, 482 U.S. 270, 296-99 (1987) (Stevens, J., concurring).



Court's decision last Term in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Exec. Ass'n*, 109 S. Ct. 2584 (1989). Prior to 1987, the federal courts had repeatedly and consistently rejected rail labor's efforts to veto these transactions under the RLA. In 1987, however, the United States Court of Appeals for the Third Circuit held that unions have the right to strike to prevent such sales,[15] and followed up in 1988 with a decision holding that such sales may be delayed pending exhaustion of the RLA major dispute procedures.[16] The resulting uncertainty about the right of carriers to sell lines under § 10901 without the unions' consent had "an immediate" chilling "impact on the formation of small railroads, threatening to halt the revitalization of marginal railroad sectors—a restructuring that the Commission ha[d] found to be in the interest of carriers, labor, and the shipping public." [17] This Court granted certiorari to resolve the uncertainty that the Third Circuit's rulings had created, and ultimately rejected the veto power rail labor claimed over § 10901 sales. 109 S. Ct. at 2597.

The need for immediate review by this Court is even more acute in these cases than it was in the *Pittsburgh & Lake Erie* cases. The decision below threatens a similar immediate chilling effect on mergers and consolidations, transactions that the Congress itself has repeatedly and unequivocally found to be in the public interest and vital to the national rail transportation policy. Only a

[15] *Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 2584 (1989).

[16] *Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989).

[17] *FRVR Corp. et al.*, ICC Finance Docket No. 31205, p. 8 (served Jan. 29, 1988), *aff'd as clarified on other grounds sub nom. Railroad Labor Exec. Ass'n* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3209 (1989), *rev'd on other grounds*, 888 F.2d 1227 (8th Cir. 1989).

definitive ruling by this Court on the question presented can ensure that the decision below will not allow rail labor to frustrate this important federal policy.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petitions for certiorari, the Court should grant writs of certiorari to review the decision of the District of Columbia Circuit.

Respectfully submitted,

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